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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 326

S. KLEIN ON THE SQUARE, INC.,
*Appellant,*

*vs.*

THE LIONEL CORPORATION,
*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

## STATEMENT AS TO JURISDICTION

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# INDEX


PAGE

The Opinion Below ..... 1

Grounds on Which Jurisdiction Is Invoked ..... 1

i) Nature of Proceeding ..... 1

ii) The Judgment Appealed From ..... 2

iii) Statute Believed to Confer Jurisdiction ..... 2

iv) Cases Believed to Sustain Jurisdiction ..... 2

v) The State Statute Involved ..... 2

Questions Presented by the Appeal ..... 2

Statement of the Case ..... 3

Raising the Federal Questions ..... 4

A. The Due Process Question ..... 5

B. The Commerce Clause Question ..... 6

The Federal Questions Presented Are Substantial .... 6

1. The Fourteenth Amendment ..... 6

The Old Dearborn Rationale ..... 8

The Schwegmann Case ..... 10

The Non-Signer Clause Violates the Fourteenth Amendment ..... 12

2. The Commerce Clause ..... 15

Conclusion ..... 20

## Appendix

PAGE

General Business Law of the State of New York (McKinney's Consolidated Laws of New York) Article XXIV-A—Fair Trade Law ..... 21

Section 5 of Federal Trade Commission Act, as Amended, Act of July 14, 1952, Chapter 746, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45 ..... 22

Opinion in the New York Court of Appeals ..... 25

Decision by Benvenga, J., in New York Supreme Court, New York County, Special Term, Part VI ..... 33

The Judgment Below ..... 34

## Table of Cases Cited

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 230 ..... 17

Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865 ..... 12

Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. (2d) 30 (1937) ..... 8

Carter v. Carter Coal Co., 298 U. S. 238, 311, 80 L. ed. 1160, 1189 ..... 14

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S. 888, 89 L. ed. 1436 ..... 2

Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 61 L. ed. 326 ..... 18

Doubleday, Doran & Co., Inc. v. R. H. Macy & Co., 269 N. Y. 272, 199 N. E. 409 (1936) ..... 8

Eubank v. Richmond, 226 U. S. 137, 143, 57 L. ed. 156, 159 ..... 14

General Electric Co. v. J. L. Brandeis & Sons, CCH 1954 Trade Cases ¶67,682 (Nebr. Dist. Ct. 1954) .... 7

BLEED THROUGH POOR COPY

PAGE

Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 209 Ga. 613, 75 S. E. (2d) 161 (1953), cert. den. 346 U. S. 823, 98 L. ed. adv. 42 (1953) ..... 7

Grayson-Robinson Stores, Inc. v. The Lionel Corporation, Docket No. 312, October 1954 Term ..... 6

In re Rahrer, 140 U. S. 546 ..... 17

International Shoe Co. v. Washington, 326 U. S. 310 .. 17

Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. (2d) 371 (1949) (Sup. Ct. Fla., not officially reported) ..... 7

Miles Laboratories, Inc. v. Eckerd, CCH 1954 Trade Cases ¶67,700 (Sup. Ct. Fla., not officially reported) 7

Nebbia v. New York, 291 U. S. 502 (1934) ..... 12

Old Dearborn Distributing Corp. v. Seagram Distillers Corp., 299 U. S. 183, 81 L. ed. 109 (1936) ....6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 19

Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357 ... 18

Pennsylvania v. Wheeling & B. Bridge Co., 18 How. (U. S.) 421, 15 L. Ed. 435 ..... 18

Perkins v. Pennsylvania, 314 U. S. 586 ..... 17

Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 90 L. ed. 1342 .....2, 18

Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913 ..... 8

Robertson v. California, 328 U. S. 440 .....16, 18

Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384, 95 L. ed. 1035 (1951) .....6, 10, 11, 12, 14, 16

Schwegmann Bros. Giant Super Market v. Eli Lilly & Co., 205 F. (2d) 788 (C. A. 5, 1953), cert. den. 346 U. S. 856, 98 L. ed. Adv. 154 (1953) ..... 6

Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N. W. (2d) 268 (1952) .. 7

PAGE

Southern Pacific Co. v. Arizona, 325 U. S. 761, 89 L. Ed. 1915 ..... 16, 17, 20

The Lionel Corporation v. Grayson-Robinson Stores, Inc., 15 N. J. 191 ..... 8

Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718 ..... 8

Union Carbide & Carbon Corp. v. White River Distrib. Inc. (Ark. Chancery Ct. 1954), ibid. ¶67,781 ..... 8

Union Carbide & Carbon Corp. v. White River Distrib., Inc. (U. S. D. C. Ark. 1954), 118 Fed. Supp. 541 .... 8

United States v. Public Utilities Commission, 345 U. S. 295, 304, 97 L. Ed. 1020, 1031 ..... 17

Washington ex rel. Seattle Title & Trust Co. v. Roberge, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214 ..... 14

Whitfield v. Ohio, 297 U. S. 431 ..... 17

Winters v. New York, 333 U. S. 507, 92 L. ed. 840 .... 2

Yakus v. United States, 321 U. S. 414, 88 L. ed. 834 ... 13

STATUTES CITED

Article I, Section 8, Cl. 3, United States Constitution.. 3

Illinois Fair Trade Act ..... 6, 8

McCarran Act ..... 18

McGuire Act, 15 U. S. C. § 45 ..... 6, 15

New York Fair Trade Law, General Business Law, Art. 24-A, Section 369-b ..... 2, 3

Section 5(a)(4), Federal Trade Commission Act, as amended by the McGuire Act ..... 16

PAGE

Section 369-b, New York General Business Law (McKinney's Consolidated Laws of New York .....2, 3, 4

Sherman Antitrust Act, as amended by the Miller-Tydings Act (Act of July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, Act of Aug. 17, 1937, C. 690, Title VII, 50 Stat. 693 (15 U. S. C. § 1) ..... 11

Title 28 United States Code § 1257(2) ..... 2

United States Constitution, Fourteenth Amendment .. 2

IN THE

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**No.**

S. KLEIN ON THE SQUARE, INC.,

*Appellant,*

*vs.*

THE LIONEL CORPORATION,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

## STATEMENT AS TO JURISDICTION

### The Opinions Below

The opinion in the New York Court of Appeals is reported at 307 N. Y. 229 and 120 N. E. (2d) 802 (see also, p. 25, *infra*). The decision of the New York Supreme Court, New York County, in which the cause originated, is available at C. C. H. 1953 Trade Cases ¶67,487.

### Grounds on Which Jurisdiction Is Invoked

#### i) Nature of Proceeding

This action was commenced by appellee in the Supreme Court of New York, New York County, pursuant to the New York "fair trade" law, to enjoin the appellant from selling products manufactured by the appellee at prices below the "fair trade" prices fixed by the appellee, and to recover damages for sales at such lower prices.

**ii) The Judgment Appealed From**

The judgment sought to be reviewed is a final judgment of the New York Court of Appeals, dated June 4, 1954, and entered in the office of the Clerk of said Court on June 4, 1954, affirming the granting of injunctive relief. The notice of appeal was filed August 3, 1954 in the New York Supreme Court, New York County.

**iii) Statute Believed to Confer Jurisdiction**

The statutory provision believed to confer jurisdiction of the appeal on this Court is Title 28 United States Code, § 1257 (2).

**iv) Cases Believed to Sustain Jurisdiction**

*Winters* v. *New York*, 333 U. S. 507, 92 L. ed. 840;
*Prudential Life Insurance Co.* v. *Benjamin*, 328 U. S. 408, 90 L. ed. 1342;
*Charleston Federal Savings & Loan Ass'n.* v. *Alderson*, 324 U. S. 888, 89 L. ed. 1436.

The appeal involves the validity of Section 369-b of the New York General Business Law (McKinney's Consolidated Laws of New York), the text of which is set out in the appendix hereto, p. 21, *infra*.

## Questions Presented by the Appeal

1. Is The New York Fair Trade Law, General Business Law, Art. 24-A, and particularly § 369-b thereof, as it applies to persons who are not parties to any "fair trade" contract entered into pursuant to § 369-a of the said Law, invalid under the Fourteenth Amendment to the Constitution of the United States as a deprivation of liberty and property without due process of law?

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2. Is the said New York Fair Trade Law, and particularly § 369-b thereof, unconstitutional in violation of Article I, Section 8 of the Constitution of the United States, as said law applies to the retail sale in New ~~Jersey~~ York of goods which are distributed by the manufacturer thereof in interstate commerce?

## Statement of the Case

The appellant, a New York corporation, operates "S. Klein on the Square," a department store in New York City. The S. Klein store policy is to offer merchandise at bargain prices. This is done by reducing costly sales service provided by other stores, and by the economies of large-scale purchasing.

The appellee, a New York corporation, manufactures toy trains and accessories which it distributes in interstate commerce throughout the country. Appellee's manufacturing activities are carried on both in and outside New York. Appellee sought to fix the prices at which its trains can be sold at retail in the State of New York. To this end, appellee entered into "agreements" with certain New York retailers other than appellant, under which those retailers agreed to sell the appellee's toy trains at prices fixed by the appellee. Section 369-b of New York's General Business Law, quoted *infra*, p. 22, (the so-called "non-signer" clause found in all state "fair trade" acts), prohibits *all* retailers in the state from selling below prices established by an agreement between a vendor and *any* retailer within the state. Appellant, however, not being a party to any such agreement, offered appellee's trains, in accordance with its regular trade policy, at prices below those fixed under the appellee's agreements with other retailers. Appellee thereupon commenced this action in the New York Supreme Court, New York County, to enjoin the appellant from continuing to offer appellee's products at below appellee's "fair trade" prices.

Appellant answered, and the cause was submitted on stipulated facts. The Supreme Court granted judgment for appellee, and a judgment was entered, pursuant to § 369-b of the General Business Law, enjoining appellant from selling appellee's toy trains below prices fixed by appellee. Appellant appealed to the Appellate Division of the Supreme Court, which affirmed the judgment below. On further appeal, the Court of Appeals affirmed the Appellate Division's judgment of affirmance.

**Raising the Federal Questions**

The federal questions presented by this appeal were originally raised by appellant's answer in the Supreme Court as independent and complete defenses to appellee's cause of action. They were preserved in the Court of Appeals, and were passed upon by that Court. All this appears from the following excerpts from the record:

**A. *The Due Process Question***

Appellant's Answer:

> "FOR A FOURTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES:
>
> • • •
>
> "22. If applied to compel defendant to sell said products at prices not below those allegedly fixed by plaintiff, Section 369-b of the General Business Law of the State of New York is unconstitutional in that it deprives defendant of its liberty and property without due process of law in violation of Article I, Section 6 of the Constitution of the State of New York and of the Fourteenth Amendment to the Constitution of the United States" (R. 28).

The Court of Appeals opinion states:

> "Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful dele-

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gation of legislative powers to private persons in violation of Article III, § 1, New York State Constitution, a deprivation of property without due process of law and a denial of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former" (*infra*, p. 28).

**B. *The Commerce Clause Question***

Appellant's Answer:

"FOR A SIXTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES:

* * *

"28. If applied to compel defendant to sell said products at prices not below those allegedly fixed by plaintiff, Section 369-b of the General Business Law of the State of New York is unconstitutional in that it constitutes an undue and unreasonable burden on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States" (R. 29-30).

The Court of Appeals opinion states:

"Defendants now present a new constitutional challenge by attacking the McGuire Act (66 Stat. 632, 15 USCA 45), which was enacted following the recent decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384. That act exempts from the Federal anti-trust laws fair trade agreements made pursuant to existing or future state laws and permits their enforcement against non-signers as well as signers who are engaged in interstate commerce. Defendants argue that this enactment gives to the states power over interstate commerce which is denied them under the Federal Constitution" (*infra*, p. 29).

## The Federal Questions Presented Are Substantial

The questions presented by this appeal are essentially the same as those presented in *Grayson-Robinson Stores, Inc.* v. *The Lionel Corporation*, Docket No. 312, October 1954 Term, an appeal from a judgment of the Supreme Court of New Jersey involving the appellee here and the appellant's corporate parent. The facts are substantially similar in both cases, and the Statement here will necessarily be highly reminiscent of the Statement filed in the New Jersey appeal. Moreover, the Questions Presented on this appeal regarding the constitutionality of the state Fair Trade Act are related to the Question Presented by a petition for certiorari being filed in this same cause regarding the constitutionality of the McGuire Act (see 15 U. S. C. § 45).

### 1. The Fourteenth Amendment

This appeal squarely requires this Court (Cf. *Schwegmann Bros. Giant Super Market* v. *Eli Lilly & Co.*, 205 F. (2d) 788 (C. A. 5, 1953), cert. den. 346 U. S. 856, 98 L. ed. Adv. 154 (1953)) to determine whether it still adheres to its decision in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936). *Old Dearborn* sustained the constitutionality of the "non-signer" provision of the Illinois Fair Trade Act, and is the constitutional basis for the "non-signer" clauses in the "fair trade" laws of some forty states.

The New York statute here involved is almost identical with the Illinois statute, and the same due process attacks were made upon the Illinois statute in *Old Dearborn* as are made here. We respectfully urge, however, that *Old Dearborn's* reasoning does not survive re-examination; that its basic premise has been invalidated by this Court's recent decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 ("*First*

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*Schwegmann''*); and that *Old Dearborn* should now be overruled.

The New York statute, *inter alia*, prohibits all retailers of branded merchandise in the State of New York from selling below the retail prices for such merchandise fixed by the manufacturer thereof in an agreement between the manufacturer and any one retailer in the State of New York. Appellant, a "non-signing" retailer, here asserts, as it asserted below, (1) that the State of New York cannot, consistent with the due process clause, require it to sell its property at any particular price, regardless of who fixes the price, solely on the ground that the property bears a brand-name or trademark, and (2) that if New York has the power to fix the price at which appellant can sell that property, New York cannot, consistent with the due process clause, delegate the power to fix the price to private persons, such as the manufacturer, imposing no standards whatever as to a) whether *any* prices shall be fixed, and b) the particular prices to *be* fixed.

As a token of the substantiality of the due process questions here raised, despite *Old Dearborn*, we may note that, in recent years, several state courts of last resort have declined to accept the validity of *Old Dearborn's* reasoning, and have held state "fair trade" legislation violative of state due process. *Liquor Stores, Inc.* v. *Continental Distilling Corp.*, 40 So. (2d) 371 (1949) (Sup. Ct. Fla.; not officially reported); *Miles Laboratories, Inc.* v. *Eckerd*, CCH 1954 Trade Cases ¶67,700 (Sup. Ct. Fla.; not officially reported); *Grayson-Robinson Stores, Inc.* v. *Oneida Ltd.*, 209 Ga. 613, 75 S. E. (2d) 161 (1953), cert. den. 346 U. S. 823, 98 L. ed. Adv. 42 (1953); *Shakespeare Co.* v. *Lippmann's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N. W. (2d) 268 (1952); see also *General Electric Co.* v. *J. L. Brandeis & Sons*, CCH 1954 Trade Cases ¶67,682 (Nebr. Dist. Ct. 1954); *Union Carbide & Carbon Corp.* v. *White River Distrib., Inc.* (Ark. Chancery Ct.

1954), *ibid.* ¶67,781; *cf. Union Carbide & Carbon Corp.* v. *White River Distrib., Inc.* (U. S. D. C. Ark. 1954), 118 Fed. Supp. 541. Several state courts of last resort, applying state constitutions, have indeed followed *Old Dearborn*, but a reading of their opinions suggests that, in doing so, they have been persuaded more by the force of this Court's authority than by the force of its rationale. *E.g.*, see *Bourjois Sales Corp.* v. *Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937) overruling (on the authority of *Old Dearborn*) *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936) (holding New York statute unconstitutional); see also *The Lionel Corporation* v. *Grayson-Robinson Stores, Inc.*, 15 N. J. 191, where, speaking of *state* constitutional questions, the Court said:

> "* * * we are bound by that decision of the United States Supreme Court [Old Dearborn] until it is overruled by the United States Supreme Court."

***The Old Dearborn Rationale***

The basic premise of *Old Dearborn* is that state fair trade laws are not "legislative price fixing", even though the plain fact is that it is the authority of the state, and that alone, which requires all retailers to abide by the resale price which some other retailer has agreed to respect (see 299 U. S. at 192). It must be noted that the opinion of this Court in *Old Dearborn* accepted the authority of *Tyson & Bro.-United Theatre Ticket Offices* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, holding that a state could not fix the resale price of theatre tickets, and of *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, holding that a state could not fix the charge for the services of an employment agency (see 299 U. S. at 191-2). To sustain the constitutionality of the Illinois Fair Trade Act, the *Old Dearborn* Court therefore could not, and did not, assert the power of the State to fix prices. Instead, it was at pains to note that the resale price restriction applied only to

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those who have acquired the subject merchandise with "knowledge" of the "restriction" on the resale price; that it applies only to "a forbidden use of the trade-mark, brand or name" attached to the merchandise in connection with its resale, and not to the merchandise apart from the "trade-mark, brand or name" (299 U. S. at 193). The Court then stated (*ibid.*):

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned."

This reasoning, we submit, begged the real question. There *is* no "existing restriction" on the non-signer's resale price unless the State imposes one. And the non-signer's knowledge, before he acquires the property, that the State has *attempted* to impose it does not give the State *power* to impose it. In short, *Old Dearborn* avoids deciding whether the State can enforce uniform resale prices by an illogical argument founded on the fictional premise that the recalcitrant retailer has given his "assent" to the price restriction.

The fiction of implied "assent" was also *Old Dearborn's* answer to the claim of unconstitutional delegation of power to fix prices (293 U. S. at 194):

> "We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond,* 266 U. S. 137, 143, 57 L. ed.

156, 158, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654; and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. ed. 1160, 1188, 56 S. Ct. 855. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction in invitum was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."

*Old Dearborn*, having thus surmounted the price-fixing and delegation hurdles, also concluded that the price restrictions, as applied to "non-signers", were not "arbitrary" 299 U. S. at 194-5. The manufacturer's "good will", embodied in his brand-name, was entitled to the protection of the price restriction, it was said; the retailer remained free to sell the merchandise free of the price restriction by removing the trade-mark, so that the "good will" would not be endangered. Whatever the validity of this part of the *Old Dearborn* doctrine, it has no application here, since it was stipulated that appellee's mark "is fixed to [its] products in such manner that it cannot be removed without marring the products to such an extent as to impair their marketability aside from the fact that [appellee's] trade-mark, brand or name has been removed therefrom. Such products are recognizable as products emanating from [appellee] even though [appellee's] trade mark, brand or name is removed therefrom" (R. 36).

***The Schwegmann Case***

This Court's recent opinion in *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U. S. 384, 95 L. ed. 1035 (1951) (*"First Schwegmann"*) destroyed the implied "assent" premise on which *Old Dearborn* was based. In

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this connection, we may note the conclusion of HOLMES, *C.J.*, dissenting, in *Schwegmann Bros. Giant Super Mkts.* v. *Eli Lilly & Co.*, 205 F. (2d) 788, 794 (CA 5, 1953) that *First Schwegmann* "has opened the door for a re-consideration of the constitutionality of fair trade laws as price fixing statutes."

The issue in *First Schwegmann* was whether the enforcement of non-signer clauses under state "fair trade" laws constituted combinations or conspiracies in restraint of trade under the Sherman Antitrust Act, as amended by the Miller-Tydings Act (Act of July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, Act of Aug. 17, 1937, C. 690, Title VII, 50 Stat. 693, 15 U. S. C. § 1). The Miller-Tydings Act had exempted from the prohibitions of the Sherman Act "contracts or agreements prescribing minimum prices" for the resale of certain commodities, when such contracts or agreements were valid under state law with respect to intrastate transactions. It was claimed in *First Schwegmann* that this exemption authorized enforcement of "fair trade" prices against the non-signer as well as against parties to resale price maintenance contracts. *Old Dearborn* had said that the non-signer gives his "assent" to the price restriction by voluntarily purchasing the goods for resale. In *First Schwegmann*, this Court said that it was precisely the *absence* of consent by the non-signer which placed enforcement against him outside the Miller-Tydings exemption:

> "They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price-fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price-fixing by contract or agreement; that is price-fixing by compulsion. That is not following the course of consensual agreement; that is resort to coercion" (341 U. S. at 388).

*First Schwegmann* thus repudiates the fictional premise on which *Old Dearborn's* holding was founded—that the non-signer's obligation to respect the "fair trade" price has its source in the non-signer's "assent", not in "legislative price-fixing". And once the non-signer clause is frankly acknowleged to involve price-fixing by legislative fiat, it is apparent that the due process questions presented here are precisely the questions which were avoided —and not decided—by *Old Dearborn*: Does the State have the power to fix resale prices on branded merchandise? If the State has such power, can it delegate to private persons the power to determine *when* resale prices shall be fixed, and *what* the prices shall be? Those questions are substantial, and have not been determined by this Court.

***The Non-Signer Clause Violates the Fourteenth Amendment***

This Court has gone far to sustain the power of the Federal and State Governments to fix prices. See *e.g., Nebbia* v. *New York*, 291 U. S. 502 (1934), and cases collected. *Nebbia* states that "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty" (291 U. S. at 539). The New York Fair Trade Act fails to meet this standard of due process.

In cases in which price regulation has hitherto been validated in this Court it has been possible to demonstrate that the challenged legislation was designed to deal with an evil affecting the particular industry being regulated, or, to deal with a general inflation or the like threatening all industry (*e.g. Block* v. *Hirsh*, 256 U. S. 135, 65 L. ed. 865) and that the remedial measures provided were reasonably designed to deal with the problem which called them

forth. Accordingly, we need not argue here that the State of New York would not, under any circumstances, have power to regulate the resale price of toy trains. The New York statute here is applicable indiscriminately to steel girders as well as to toy trains, to goods having limited and local distribution, as well as nationally advertised goods, to sales by wholesalers, by jobbers to industrial users, as well as to sales by retailers to private consumers. We venture to say that no other price-fixing legislation heretofore validated by this Court—with the exception of temporary measures against inflation—is applicable to anything like the wide range of goods and industries to which the New York statute applies.

In cases where price legislation applied to a relatively large number of goods or services, some machinery has generally been provided by which the legislative policy could be responsibly particularized and applied to individual industries and individual situations. *Yakus* v. *United States*, 321 U. S. 414, 88 L. ed. 834. No such mechanism is here provided for determining whether, in particular industries, or at particular resale levels, conditions exist which justify the imposition of price restrictions, or for otherwise adapting legislative policy to self-evident differences in different industries. Indeed, the statute contains no statement of legislative findings of the supposed evils to which the legislatively enforced price retrictions are addressed.

The power of the "vendor" to determine whether resale price restrictions shall become applicable does not supply machinery for relating legislative policy to particular situations. The "vendor" who makes the restrictions applicable is left free to create the restrictions for private reasons of his own, and for reasons wholly unrelated to the legislative policy. The range of private reasons, unrelated to any standard of public welfare, which may move the vendor to act, is suggested by the facts (a) that resale price

maintenance was unlawful at common law, (b) was, until recently, a federal crime (*First Schwegmann*) in every state, and indeed (c) is still a federal crime in states which do not have "fair trade" laws.

In sum, the statute is completely arbitrary because, being applicable indiscriminately to resales at every level, in all industries, it is not and cannot be based upon a responsible legislative determination that evils exist which require the remedy of resale price maintenance at any particular resale level in any particular industry or industries.

But worst of all, the price restrictions actually imposed are themselves "irrelevant to [any] policy the legislature is free to adopt" (see *Nebbia, supra*) and are determined and enforced by a procedure so arbitrary as to offend due process. The statute leaves to the "vendor" the power to determine (a) whether *any* compulsory resale price shall be fixed, and (b) *what* that price will be. The statute provides no standards for relating either of these private determinations to any statutory policy. The appellant is here enjoined from selling the appellee's toy trains for $16.87. But if the appellee and appellant had agreed to fix the price at $16.87, New York would *compel* every retailer in the State to sell *at* that price.

If the State has constitutional power to enforce a uniform resale price structure, there is no power to give to private parties the right to legislate *when* there shall be a uniform price, and *what* that uniform price shall be. Such a delegation of legislative power to private persons is so arbitrary as plainly to violate due process. *Eubank* v. *Richmond*, 226 U. S. 137, 143, 57 L. ed. 156, 159; *Washington ex rel. Seattle Title & Trust Co.* v. *Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. ed. 1160, 1189. As *Carter* says:

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or

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an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to others in the same business. * * *

"The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." [Citing *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. at p. 537, 79 L. ed. 1584, and cases cited *supra*, p. 14.] (298 U. S. at 311, 80 L. ed. at 1189.)

*Old Dearborn* is no bar to consideration of the due process question raised, nor to the reversal of the judgment below. "To the decision of an underlying question of constitutional law no * * * finality attaches. To endure, it must be right." George Bancroft, quoted at 2 Warren, The Supreme Court in United States History, 749. "* * * [It] is of the highest importance that the Judiciary should always be pervious to demonstration of judicial error as to the original meaning of the Constitution, and prepared to correct its own mistakes." Warren, *ibid.*

**2. The Commerce Clause**

Appellant contends that the New York statute, as here applied, is unconstitutional under the commerce clause of the federal Constitution, despite the effort of Congress to immunize "fair trade" legislation from commerce clause objections by the McGuire Act (see 15 U. S. C. § 45, quoted

*infra*, pp. 22, *et seq.*). The commerce clause aspects of "fair trade" were not raised or determined in *Old Dearborn, supra.*

It was clear from *First Schwegmann, supra,* that the application of the New York Fair Trade Law to goods like appellee's, distributed in interstate commerce, affects the flow of such goods in commerce. By section 5(a)(4) of the Federal Trade Commission Act, as amended by the McGuire Act, Congress attempted to immunize state "fair trade" laws from the resulting commerce clause difficulties. Section 5 exempts "fair trade" contracts, and the enforcement of state "non-signer" clauses, from the prohibition of the anti-trust laws. Section 5(a)(4) then provides:

> "Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any rights or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference, with commerce."

The essential question here presented is whether this declaration by Congress is sufficient to validate state "fair trade" laws under the commerce clause. If not, the State statute is invalid under that clause (*Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 89 L. ed. 1915), and the judgment here, which depends on the State statute, must be reversed.

We are aware, as this Court said in *Southern Pacific Co.* v. *Arizona, supra,* that "Congress has undoubted power to redefine the distribution of power over interstate commerce." As a corollary to this principle, there are now four established categories into which state regulation affecting commerce may fall, depending on the nature and subject-matter of the regulation, and the silence, acquiescence or disapproval of Congress: (1) Congress being silent, the state regulation is valid under the commerce clause (*Robertson* v. *California*, 328 U. S. 440); (2) the state regulation, otherwise valid, is invalid because Con-

gress has occupied the field or otherwise disapproved (*Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 230); (3) Congress being silent, the state regulation is invalid under the commerce clause (*Southern Pacific* v. *Arizona, supra;* (4) state regulation, otherwise invalid, is valid because Congress consents. (*In re Rahrer,* 140 U. S. 546.)

We suggest here that the right of Congress to cede jurisdiction over commerce to the state is not an unlimited one and does not extend to all subjects of regulation; that Congress cannot take all matters out of (3) and put them into (4). It is one thing to say that Congress, in the accommodation of state and federal interests, can permit the states to do *some* things which would otherwise be forbidden under the commerce clause. But this need not mean, for example, that Congress can permit New York State to fix the price of railroad travel from New York City to Los Angeles.

The kinds of cases in which this Court has found state regulation affecting commerce to be valid by virtue of special Congressional approval are not overly numerous, possibly because only a "few unique federal statutes" (*United States* v. *Public Utilities Commission,* 345 U. S. 295, 304, 97 L. ed. 1020, 1031) provide such approval. States which adopted prohibition laws were permitted to prohibit resale, within the state, of liquors received in interstate commerce. *In re Rahrer, supra.* States which had adopted laws to prohibit prison labor from competing with free labor within the state, were permitted to prohibit the sale, within the state, of imported prison goods. *Whitfield* v. *Ohio,* 297 U. S. 431. States were permitted to levy unemployment insurance taxes on employers engaged in commerce within the State (*Perkins* v. *Pennsylvania,* 314 U. S. 586; *International Shoe Co.* v. *Washington,* 326 U. S. 310).

*Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 90 L. ed. 1342, which, relying on the McCarran Act (15 U. S. C. §§ 1011-1015), sustained a South Carolina tax on an interstate insurer, was at pains to note first, that the insurance business was "atypical", and, second, that the solution of the commerce clause problems presented by state regulation and taxation of the insurance business "have origin in [the] history" of state regulation following *Paul* v. *Virginia*, 8 Wall. (U. S.) 168, 19 L. ed. 357, and that "their solution cannot escape its influence" (328 U. S. at 413). But more than this, it is apparent, as *Robertson* v. *California*, 328 U. S. 440, makes clear, that the regulation of the insurance business, which Congress, by the McCarran Act, left to the States has, as its principal object and purpose the protection of local policy holders from "fraudulent or unsound insurance"; the regulating state it was said, had a "highly 'specialized interest'" in such regulation (328 U. S. at 458, 448).

*Prudential*, it is true, contains broad dicta, which rely primarily on *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 18 How. (U. S.) 421, 15 L. ed. 435 and *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326, as to the extent of the power of Congress to leave regulation of commerce to the States. But in neither of the two cited cases had Congress simply left regulation to the States; in the *Bridge* case, Congress had itself declared that a particular bridge was not an unlawful obstruction to commerce; in *Clark Distilling*, Congress itself prohibited the transportation of liquor in interstate commerce to States which had adopted prohibition laws. Significantly, *Prudential* itself stands as a warning that one must judge the commerce clause cases by their results, not their varying rationales (328 U. S. at 423-4).

And the results of those cases are these: whenever this Court, relying on Congressional assent, has sustained state regulation otherwise invalid under the commerce clause,

the State regulation has a) either been auxiliary to the enforcement of some local policy, conceived without relation to the commerce itself, or b) has been designed to protect the citizens of the State in their contacts with such commerce. Far from recognizing an unlimited power in Congress to authorize any and all state regulation of interstate commerce, this Court, in each case, took occasion to point out why the regulating state had some special interest in the particular subject matter involved.

"Fair trade" laws do not fit this pattern. They necessarily involve more than the protection of local interests, *e.g.*, local retailers from the competition of "price cutters"; no such protection is afforded to the local interests unless the manufacturer or "vendor" so wills it. Moreover, the supposed "due process" justification for fair trade is that the manufacturer's "good will", not the local retailer, must be protected. See *Old Dearborn, supra,* 299 U. S. at 195. If that be so, a State's regulation of interstate commerce, more often than not, is for the benefit of out-of-state interests, since in any one state, the likelihood is that most of the nationally advertised merchandise which is most commonly fair-traded will have been imported from out of the state.

The state statute, then, does more than affect interstate commerce as an incident to the enforcement of some policy having its source in essentially local concerns; it embodies a policy with respect to the commerce itself, a policy conceived, in large or major part, to protect the interests of out-of-state manufacturers whose goods are shipped into the state. No previous decision in this Court holds that the states are free, under the commerce clause, to burden commerce under such regulations, even with Congressional approval. It is submitted, therefore, that the second question presented is a substantial one. Moreover, for the reasons adverted to above in the discussion of the due process question, the statute here imposes a burden on commerce

not justified by any reasonable relationship between the regulation and any evil sought to be remedied. *Southern Pacific* v. *Arizona, supra.*

## Conclusion

The questions involved are complicated and important, as well as "substantial". They affect the validity of the "fair trade" laws of over 40 states, and important business interests of retailers, wholesalers and manufacturers in nearly every industry. They ought to be resolved only after plenary consideration by this Court. Probable jurisdiction should be noted and the case set down for argument with *Grayson-Robinson Stores, Inc.* v. *The Lionel Corporation*, Docket No. 312, October Term, 1954.

Respectfully submitted,

SIDNEY A. DIAMOND,
of New York City,
*Attorney for Appellant.*

ROOSEVELT, FREIDIN & LITTAUER,
HERBERT PRASHKER,
*and*
MURRAY GARTNER,
all of New York City,
*Of Counsel.*

Dated: New York City,
September 1, 1954.

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# APPENDIX

## General Business Law of the State of New York

### (McKinney's Consolidated Laws of New York)

ARTICLE XXIV-A—FAIR TRADE LAW

"§ 369-a. *Price fixing of certain commodities permitted.*

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court."

"§ 369-b. *Unfair competition defined and made actionable.*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

"§ 369-c. *Exceptions.*

This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."

"§369-d. *Definitions.*

The following terms, as used in this article, are hereby defined as follows: 'Producer' means grower, baker, maker, manufacturer or publisher. 'Commodity' means any subject of commerce."

"§ 369-e. *Effect of partial invalidity.*

If any provision of this article is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. Added L. 1940, c. 195, § 3, eff. March 19, 1940."

**Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45:**

(a) (1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

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## The Opinions Below

**Opinion in the New York Court of Appeals:**

GENERAL ELECTRIC COMPANY,
*Respondent,*

*v.*

MASTERS, INC.,
*Appellant.*

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LIONEL CORPORATION,
*Respondent,*

*v.*

S. KLEIN ON THE SQUARE, INC.,
*Appellant.*

---

RAXOR CORPORATION et al.,
*Respondents,*

*v.*

SAM GOODY,
*Appellant.*

Argued April 19, 1954; decided June 4, 1954.

* * * * *

APPEAL, in the first above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered January 5, 1954, unanimously affirming a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a decision of the court at Special Term (O'Brien, *J.*).

Appeal, in the second above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 26, 1953, unanimously affirming a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a decision of the court at Special Term (Benvenga, *J.*).

Appeal, in the third above-entitled action, on constitutional grounds, from a judgment in favor of plaintiff, entered December 31, 1953, upon a resettled order of the Appellate Division of the Supreme Court in the first judicial department, which modified, and, as modified, affirmed a judgment of the Supreme Court in favor of plaintiffs, entered in New York County upon a decision of the court on a trial at Special Term (Isidor Wasservogel, Special Ref.). The modification consisted of deleting phonograph records bearing the trade-mark "Soria Series" from the injunctive provisions of the judgment.

• • • • •

Froessel, *J.* We are again confronted with an attack upon the so-called Feld-Crawford "Fair Trade Law" (General Business Law, § 369-a *et seq.*, L. 1935, ch. 976, reenacted L. 1940, ch. 195). This statute first came before us for review in *Doubleday, Doran & Co.* v. *Macy & Co.* (269 N. Y. 272), decided January 7, 1936, wherein plaintiff Doubleday sought to enjoin Macy, a nonsigner of its fair trade agreements, from selling three of plaintiff's books at less than their stipulated fair trade prices. We held that the "non-signer" provision was unconstitutional, because by its means the Legislature was indirectly fixing

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prices, a result which it could not, absent special circumstances, accomplish directly.

Exactly eleven months later, the Supreme Court of the United States reviewed a similar statute enacted in Illinois, the validity of which was attacked "upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment". Rejecting these contentions, the Supreme Court held that the statute was not "so arbitrary, unfair or wanting in reason as to result in a denial of due process", that it did not constitute an unlawful delegation of legislative power, and that it satisfied the test of equal protection of the laws guaranteed by the Fourteenth Amendment (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183).

Almost immediately thereafter, the New York statute was again before us in *Bourjois Sales Corp.* v. *Dorfman* (273 N. Y. 167). This time, relying on the *Old Dearborn* decision, we upheld the statute against claims that it violated the *New York State* Constitution. Indeed, Chief Judge Crane, who wrote for the court in *Doubleday* as well as the *Bourjois* case, said in the latter (p. 172): "Had the *Seagram* [*Old Dearborn*] case been decided before argument in the *Doubleday* case we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now". The statute has since been considered and applied by us in at least four cases (*Port Chester Wine & Liquor Shop* v. *Miller Bros. Fruiterers*, 281 N. Y. 101 [retailer's right of action]; *Guerlain, Inc.* v. *Woolworth Co.*, 297 N. Y. 11, certiorari denied 332 U. S. 837 [rebottling of perfumes]; *Calamia* v. *Goldsmith Bros.*, 299 N. Y. 636, remittitur amended 299 N. Y. 795 [cigars in interstate commerce]; and *Bristol-Myers Co.* v. *Picker*, 302 N. Y. 61 [trading stamps as price cutting]), in all of which

validity of the law under the New York State Constitution was urged upon us by the parties, but rejected.

In each of the three cases now before us, the defendant, a nonsigner of the plaintiff's fair trade agreements, has been enjoined from selling plaintiff's fair traded products at less than their stipulated minimum prices. All of the transactions in issue involve interstate commerce either directly or indirectly, and, since in large measure the issues presented by the three cases are identical, they shall be discussed together, insofar as possible.

Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful delegation of legislative powers to private persons in violation of section 1 of article III of the New York State Constitution, a deprivation of property without due process of law and a denial of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former.

Seventeen years ago we disposed of the delegation of power and due process arguments in the *Bourjois* case (*supra*). Even though our opinion did not separately and specifically discuss those issues as arising under the State Constitution, they were actually presented and argued to our court, were necessarily disposed of by our decision there, and are therefore no longer open to question.

Defendants' economic and policy arguments concerning the doubtful wisdom of fair trade laws have been urged before the courts over and over again. They were reviewed in the *Old Dearborn* case (*supra*, pp. 195-196), and, as was there said, "Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the legislature"; its determination "is conclusive so far as this court is concerned" (p. 196). Such contentions are properly addressed to the Legisla-

ture; they do not alone provide sufficient reason for us to reopen settled constitutional issues.

Nor is there merit to defendants' contention that the statute denies equal protection of the laws. In the *Old Dearborn* case (*supra*) the equal protection argument which was there raised against the Illinois fair trade statute was summarily rejected by the Supreme Court in its holding (p. 197): "Clearly, the challenged section of the Illinois act *satisfies this test*" (emphasis supplied). In the present case, moreover, the statute creates no unreasonable or arbitrary discrimination against low cost, minimum service retailers, as defendants contend. The statute itself does not purport to create any such distinction or classification. Its provisions are wholly inapplicable to unmarked goods. As to marked goods, it merely permits a manufacturer, whose trade-mark or brand name may represent a large advertising investment and a carefully nutured good will, to prevent retailers, over whom he would otherwise have little control, from seriously impairing the value of that trade-mark and good will by reselling his identified products at unreasonably low prices. Finally, we have already held that this statute constitutes a reasonable regulation under the police power (*Bourjois* case, *supra*).

Defendants now present a new constitutional challenge by attacking the Maguire Act (66 U. S. Stat. 632, U. S. Code, tit. 15, § 45), which was enacted following the recent decision in *Schwegmann Bros.* v. *Calvert Corp.* (341 U. S. 384). That act exempts from the Federal antitrust laws fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against nonsigners as well as signers who are engaged in interstate commerce. Defendants argue that this enactment gives to the States power over interstate commerce which is denied them under the Federal Constitution.

Beginning with the familiar distinction between commerce which, while primarily local, indirectly affects interstate commerce, and that which is directly of national concern, defendants claim that the latter type of commerce is, by virtue of the Constitution, *exclusively* within the power of Congress, and cannot under any circumstances be regulated by the States. However, this basic distinction is drawn merely to determine the extent of State power in those areas where Congress by its silence has permitted its own power to remain dormant. The distinction does not, as defendants contend, restrict the power of a State acting, as here, under an express grant by Congress (*Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421-423). As the Supreme Court said in *Southern Pacific Ry. Co.* v. *Arizona* (325 U. S. 761, 769): "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may * * * permit the states to regulate the commerce in a manner which would otherwise not be permissible [citations]".

It is true that in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*) the Supreme Court held that by the Miller-Tydings amendment (50 U. S. Stat. 693, U. S. Code, tit. 15, § 1), which exempted from the Sherman Antitrust Act only "contracts or agreements". Congress did not demonstrate an intent to permit fair trade "compulsion" against nonsigners of those agreements. However, the court did not in its opinion indicate that such "compulsion", if expressly authorized by Congress, would transgress any constitutional prohibition; indeed, the decision contains clear implications to the contrary. The Maguire Act now authorizes such "compulsion", and its constitutionality has been upheld by the United States Court of Appeals for the Fifth Circuit in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.* (205 F. 2d 788), a decision which the Supreme Court twice refused to review (certiorari denied 346 U. S. 856, rehearing denied 346 U. S. 905).

Nor should we for this purpose distinguish between transactions affecting interstate commerce, as in the *General Electric* and *Lionel* cases herein, and those directly in interstate commerce, such as the mail-order sales of the *Raxor* case. Just as in the Feld-Crawford Act, where no distinction is drawn between interstate and local commerce, so the language of the Maguire Act makes no discrimination between sales of goods affecting, and sales directly in, interstate commerce. On the contrary, the purpose of that Federal statute, as expressed by Congress in its preamble thereto, was to permit State fair trade laws to apply to commodities, contracts and activities "in or affecting" interstate commerce. Furthermore, the case of *Sunbeam Corp.* v. *Wentling* (185 F. 2d 903, revd. 341 U. S. 944, mod. 192 F. 2d 7), on which defendants rely so heavily in this connection, was decided prior to the Maguire Act's enactment. That the statute was designed to alter the *Wentling* rule so as to open all interstate commerce to the operation of State fair trade acts, appears from the statutory language as aforesaid, from its legislative history and from judicial decision (*Sunbeam Corp.* v. *MacMillan,* 110 F. Supp. 836).

Defendants further contend that the Feld-Crawford Act was never originally intended by our Legislature to apply to resale price maintenance as against nonsignatories engaged in interstate commerce, and that without re-enactment after passage of the Maguire Act it cannot be so applied. But the case of *People* v. *Bootman* (180 N. Y. 1), on which defendants rest this argument, is inapplicable here. True, we there held that without re-enactment after passage of the Congressional enabling statute, our State Fish and Game Law was not applicable to interstate game. But there, we had previously held that the statute in question was intended to apply only to *local* game (*People* v. *Buffalo Fish Co.,* 164 N. Y. 93).

In the instant cases, however, instead of having, by prior decision, limited the Feld-Crawford Act to local commerce, we have squarely held that the statute applies to non-signatories in *interstate* commerce (*Calamia* v. *Goldsmith Bros., supra*). Although such application was later declared unconstitutional in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*), passage of the Maguire Act in 1952 removed the final barrier to complete interstate application of the New York statute. Under such circumstances it has long been well established that the Constitution does not require a State statute to be re-enacted in order to be effective (*Matter of Rahrer*, 140 U. S. 545; *Central Pacific R. R. Co.* v. *Nevada*, 162 U. S. 512; *Tua* v. *Carriere*, 117 U. S. 201; 1 Sutherland on Statutory Construction [3d ed.], § 2027).

Each of the defendants contends that its plaintiff's fair trade contracts do not comply with the provisions of section 369-a of the General Business Law. We have examined these contracts separately, and find on the records before us that in each case there were in existence fair trade contracts which did comply with that part of the statute which sanctions such contracts between "vendor" and "buyer".

Numerous other contentions have been raised by one or more of the defendants. We have carefully considered each of them and find them to be without merit.

The judgment in each case should be affirmed, with costs.

Lewis, *Ch. J.*, Conway, Desmond, Dye and Fuld, *JJ.*, concur; Van Voorhis, *J.*, taking no part.

In each action: Judgment affirmed.

## Decision by Benvenga, *J.*, in New York Supreme Court, New York County, Special Term, Part VI

This is an action under the Feld-Crawford Fair Trade Act (General Business Law, sec. 369-a et seq.), to enjoin defendant from selling toy electric trains and accessories manufactured by the plaintiff under the trade mark "Lionel" at less than the fair trade retail prices established for the commodity. The facts have been stipulated. The principal questions raised are: (1) whether the act is constitutional; and (2) whether the plaintiffs' form of "fair trade" agreement complies with the requirements of the act. On the authority of General Electric v. Klein (N. Y. L. J., February 20, 1953, p. 583, Walter, J.), judgment is directed for the plaintiff in accordance with the prayer for relief. Settle judgment providing for a reference to assess damages.

## The Judgments Below

Index No. 16151/1952

At a Special Term, Part VI of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Foley Square, Borough of Manhattan, City of New York, on the 20th day of May, 1953.

Present:

HON. FELIX C. BENVENGA,
*Justice.*

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THE LIONEL CORPORATION,

*Plaintiff,*

*against*

S. KLEIN ON THE SQUARE, INC.,

*Defendant.*

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This action having been instituted by the plaintiff against the defendant for an injunction and for damages, and the cause having duly come on to be heard before me for trial at Special Term Part VI of this Court, at the New York County Courthouse, Borough of Manhattan, City, County and State of New York, on the 7th day of April, 1953, and the parties having appeared by their respective counsel and having presented their proofs and due deliberation having been had thereon, and a written decision dated May 11, 1953, having been made and filed, and the Court having directed judgment as hereinafter provided,

Now on motion of Klein, Wikler & Gottlieb, attorneys for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED:

That the defendant, S. Klein on the Square, Inc., its officers, agents, servants and employees and all other persons acting under its authority or control be, and they hereby are permanently enjoined and restrained from, advertising, offering for sale or selling at retail in the State of New York, Lionel model toy trains and accessories bearing plaintiff's trademarks, brands and name, all as more particularly described in the price sheet annexed to the complaint herein and subsequent revisions thereof and substitutions therefor, at prices lower than the retail resale prices now established therefor by the plaintiff, pursuant to agreements entered into between the plaintiff and various retail dealers in such commodities throughout the State of New York, or at such retail resale prices as may hereafter be established for such commodities by the plaintiff as provided in said agreements; and it is further

ORDERED, ADJUDGED AND DECREED:

That the plaintiff, The Lionel Corporation, of 15 East 26th Street, Borough of Manhattan, City and State of New York, do recover of the defendant, S. Klein on the Square, Inc., of 6 Union Square, Borough of Manhattan, City and State of New York, the sum of $176.50 costs and disbursements as taxed by the Clerk of the Court.

Enter

F. C. B.,
*J. S. C.*

ARCHIBALD R. WATSON,
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE LIONEL CORPORATION,

*Plaintiff,*

*against*

S. KLEIN ON THE SQUARE, INC.,

*Defendant.*

The above named defendant, S. Klein on the Square, Inc., having appealed to the Appellate Division of the Supreme Court, First Judicial Department, from a judgment of the Supreme Court entered in the office of the Clerk of the County of New York on the 20th day of May, 1953, which judgment was entered in favor of the plaintiff and against the defendant; and the said appeal having come on to be heard before the Appellate Division, First Judicial Department, and the said Appellate Division having duly made an order, a certified copy of which, with the papers on which the appeal was heard, was filed on the 15 day of October, 1953, in the office of the Clerk of the County of New York, by which it appears that said Appellate Division has ordered that the said judgment so appealed from as aforesaid be in all things affirmed, with costs, and said costs having been duly taxed,

Now on motion of Klein, Wikler & Gottlieb, attorneys for the plaintiff, it is

ADJUDGED that the judgment herein entered on the 20th day of May, 1953, be and the same hereby is in all things affirmed; and it is further

ADJUDGED that the said plaintiff recover of the defendant, S. Klein on the Square, Inc., the sum of $180.30 the

amount of costs herein as taxed, and that it have execution against said defendant, S. Klein on the Square, Inc., therefor.

Judgment signed and entered this 26 day of October, 1953.

ARCHIBALD R. WATSON,
Clerk.

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## COURT OF APPEALS

STATE OF NEW YORK ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall in the City of Albany, on the 4th day of June in the year of our Lord one thousand nine hundred and fifty-four, before the judges of said Court.

WITNESS,

The HON. EDMUND H. LEWIS,
*Chief Judge, Presiding*

RAYMOND J. CANNON, Clerk

Remittitur—June 4, 1954

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THE LIONEL CORPORATION,
*Respondent,*

*vs.*

S. KLEIN ON THE SQUARE, INC.,
*Appellant.*

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BE IT REMEMBERED, That on the 11th day of March in the year of our Lord one thousand nine hundred and fifty-four, S. Klein on the Square, Inc., the appellant in this cause, came here unto the Court of Appeals, by Roosevelt,

Freidin & Littauer, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, And The Lionel Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by Klein, Winkler & Gottlieb, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Sidney A. Diamond, of counsel for the appellant, and by Mr. Harry A. Gottlieb, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the justices thereof, & c.

Raymond J. Cannon
Clerk of the Court of Appeals
State of New York

Court of Appeals, Clerk's Office,
Albany, June 4, 1954

I Hereby Certify, that the preceding record contains a correct transcript in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

(Seal)